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No. 01-520

In the

Supreme Court of the United States

R.W. DOCKS & SLIPS,

Petitioners,

v.

STATE OF WISCONSIN AND WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondents.

On Petition for Writ of Certiorari to The Supreme Court of Wisconsin

BRIEF *AMICUS CURIAE* OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amicus Curiae will address the following questions:

Whether the public trust doctrine is an absolute defense for a state, thereby preventing it from ever having to pay compensation under the Fifth Amendment?

Whether the 71 boat slips should be treated as individual properties for the purposes of determining the economic impact on the property owner?

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BRIEF *AMICUS CURIAE* OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITIONER

Pursuant to Rule 37.3 of the Rules of this Court, *amicus curiae* submits this brief in support of petitioner.[1] Both parties have consented to the filing of this brief.

[1] No counsel for either party authored this brief *amicus curiae*, either in whole or in part. Furthermore, no persons other than *amicus curiae* contributed financially to the preparation of this brief.

INTERESTS OF AMICUS CURIAE

Defenders of Property Rights is the only national legal defense foundation dedicated exclusively to protecting private property rights. Based in Washington, D.C., Defenders was founded as a non-profit, public interest legal foundation in 1991. Its mission is to protect vigorously those rights considered essential by the Framers of the Constitution, and to promote a better understanding of the relationship between private property rights and individual liberty.

Defenders of Property Rights engages in litigation across the country on behalf of its members and the public interest to prevent government incursion into protections guaranteed by the Bill of Rights. Defenders participated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Keene Corp. v. United States*, 508 U.S. 200 (1993); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Bennett v. Spear*, 520 U.S. 154 (1997); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); and, *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001).

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

R.W. Docks ("Docks") is a general partnership that owns 1,100 feet of frontage along lake Superior in Bayfield, Wisconsin. *R.W. Docks & Slips v. Wisconsin*, 628 N.W.2d 781, 784 (Wis. 2001). In 1969, Docks sought and received approval from the Wisconsin Department of Natural Resources (DNR) and the Army Corp of Engineers to construct a breakwater and boat harbor in connection with the development of a marina. *Id.* at 784. Docks proceeded to continue building the marina over the next eight years, constructing the breakwater, docks containing 201 boat slips, a sea wall, a lagoon, a port, and several recreational facilities on land. *Id.* All the while, Docks was given the necessary permits from DNR and the Corps. *Id.*

In 1977, Docks converted the marina into condominiums, selling each of the 201 slips as a separate piece of property. *Id.* At this time, the development of the marina was not complete, as there were still 71 slips awaiting permit approval and construction. *Id.* at 785. In 1986 the DNR denied the dredging permit necessary to build the final 71 slips. *Id.* The permit was denied because of the environmental consequences that would ensue for a small weedbed that had developed as a result of the protection

provided by a breakwater built by Docks. *Id.* Docks exhausted its administrative remedies and sued the DNR in circuit court alleging an unconstitutional taking. *Id.*

The circuit court granted DNR's motion for summary judgment, holding that Docks did not have a recognizable interest in the undeveloped 71 slips, that there could be no taking because the land was subject to the public trust doctrine, and that there was no taking because Docks retained considerable use of the parcel as a whole. *Id.* The court of appeals affirmed only the last issue, holding that there was no taking since Docks still enjoyed the use of the completed 201 slips. *Id.* The court of appeals did not address the other issues. *Id.* The Wisconsin Supreme Court accepted review and affirmed the lower court's ruling, holding that there was no taking because (1) the land was subject to the public trust doctrine, (2) there was no recovery available for a partial regulatory taking in Wisconsin, and (3) even if there could be recovery for a partial taking, the economic impact on Docks was minimal when viewed against the value of the parcel as a whole. *Id.* at 791.

REASONS FOR GRANTING THE WRIT

I. THE ISSUE OF WHETHER THE PUBLIC TRUST DOCTRINE SERVES AS AN ABSOLUTE DEFENSE FOR THE STATE, ABSOLVING IT OF ANY RESPONSIBILITY UNDER THE JUST COMPENSATION CLAUSE

The public trust doctrine dates back to the Northwest Ordinance of 1787, which was originally designed to ensure that navigable waters "shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost, or duty therefore." WIS. CONST. art. IX, § 1. The fact that the doctrine was originally intended to protect navigation rights is evidenced by the use of the saw-log test, a method whereby navigability was determined by whether a stream, during even part of the year, could be used to float logs to the market. *Olson v. Merrill*, 42 Wis. 203, 212 (1877). The doctrine has in recent years been expanded to include protection of recreational uses, including fishing, hunting, and boating. *Muench v. Pub. Serv. Comm'n*, 53 N.W.2d 514, 518-20 (Wis. 1952).

In this case, the trial court first determined that the denial of the dredging permit in this case "implicated only Docks' riparian rights, which are subject to the public trust doctrine." *Id.* at 789. The court went on to note that since the only rights affected were subject to the public trust

doctrine, "Docks has failed to demonstrate a compensable regulatory taking." *Id.* The court reasoned, "[i]f Docks had no private property right to place boat slips on the lakebed at the marina, it cannot have suffered an unconstitutional taking." *Id.* at 787. Thus, under the decision below, once a court determines that a piece of property is subject to the public trust doctrine, no partial or categorical taking could occur because the owner had no right to the property in the first place. This hard and fast rule ignores this Court's precedent to the contrary, and is therefore worthy of consideration.

This Court has consistently held that the purpose of the Just Compensation Clause is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Given the complexities inherent in this type of analysis, the Court has been unwilling to impose stringent per se rules, instead recognizing that "whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (citation omitted) (brackets in original).

Wisconsin attempts to justify its *per se* rule by noting that the public trust doctrine "is established 'by judicial authority so long acquiesced in as to become a rule of property.'" *R.W. Docks*, 628 N.W.2d at 788 (citation omitted). However, whether property is subject to the public trust doctrine should at least be a consideration in any takings analysis.

In fact, both the categorical and the partial takings analysis' handed down by this Court compel such a consideration. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) holds that a state has a defense to a categorical takings claim if its limitations "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029. Similarly, a *Penn Central* partial takings analysis requires the consideration of the "distinct investment-backed expectations" of the landowner. *Penn Central Transp. Co.*, 438 U.S. at 124.

Moreover, as was noted previously, the public trust doctrine has emerged considerably over the years from its original purpose, which was to protect the right of all people to freely navigate our country's waterways. The doctrine today has been expansively interpreted to protect "recreational purposes such as boating, swimming, fishing, hunting, recreation, and to preserve scenic beauty." *R.W.*

Docks, 628 N.W.2d at 788. Given the transformation of the doctrine beyond its original intent, there simply has to be the possibility for an individual, fact-based analysis.

For example, there would be a distinction made between an obstruction across a waterway that inhibits navigation and a proposed dock that might jeopardize a small, underwater weedbed that only grew as a result of a breakwater the developer had built during the initial stages of a state-approved project. *Id.* at 784. Courts must be allowed to distinguish between situations that strike at the heart of the public trust doctrine and those that rest on the periphery, especially in the fact-driven world of takings analysis.

However, under the decision of the court below, no possibility for a different analysis exists. Once the court has determined that the public trust doctrine applies, no further consideration of the factual circumstances particular to that case would be permitted, contrary to this Court's mandate in *Lucas* and *Penn Central*. *See Lucas,* 505 U.S. at 1028-29; *Penn Central Transp. Co.*, 438 U.S. at 123-24.

Under this Court's precedent, even a finding that the factual situation involved the existence of the navigational servitude which gave rise to the public trust doctrine would not be an automatic bar to recovery. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), this Court held that the public's right to access a navigable waterway of the United

States and the consideration of whether enforcement of that right amounted to a private taking were two entirely different questions. *Id.* at 174-75. The Court stated that factors specific to the case made it such that "the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking." *Id.* at 178. Thus, even in a situation involving the analytical base of the public trust doctrine, the government could be required under the Fifth Amendment to compensate the landowner for the taking. *Id.* at 179-80. The Wisconsin Supreme Court's rule to the contrary, holding that compensation would never be appropriate when the public trust doctrine has been implicated, regardless of the public interest involved, cannot be reconciled.

The court below emphasized that the public trust doctrine has existed for a considerable length of time, to the point that "[i]t is part of the organic law of the state." *R.W. Docks*, 628 N.W.2d at 788 (citation omitted). However, the recognition that a possible restriction on a piece of land predated the acquisition of the parcel cannot by itself be dispositive. Just last term, in *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001), the Court rejected the notion that "[a] purchaser or a successive title holder . . . is deemed to have notice of an earlier-enacted restriction and is barred from

claiming that it effects a taking." *Id.* at 2462. The Court went on to note that just because a law or doctrine is old does not mean that a taking is automatically barred, holding that "[f]uture generations, too, have a right to challenge unreasonable limitations on the use and value of land." *Id.* at 2463. The holding below cannot be reconciled with this Court's precedent, and it is therefore worthy of review.

II. THE LOWER COURTS OF APPEAL AND STATE COURTS AND STATE COURTS NEED GUIDANCE FROM THIS COURT ON THE RELEVANT PARCEL ISSUE

After deciding that the public trust doctrine served as an absolute defense for the state, thereby preventing any recovery for the property owner, the court below nevertheless went on to conduct a three-step *Penn Central* analysis. *See R.W. Docks*, 628 N.W.2d at 790-91. In the course of considering the *Penn Central* factors, the court evaluated the economic impact of the taking based on the entire parcel of land, as opposed to only looking at the portion actually subject to the state regulations, and denied recovery on the grounds that the owner had not been deprived of all or substantially all practical uses of the property. *Id.* at 790.

The court below's failure to recognize the possibility of recovery in situations where something less than the entire parcel is affected is clearly contradicted by this Court's

decisions in *Lucas*. *See Lucas*, 505 U.S. at 1019, n.8. In *Lucas*, Justice Scalia explicitly stated that a property owner who suffered something less than the complete deprivation of all economic value in his property would still be able to pursue a partial takings claim pursuant to the *Penn Central* analysis. *See id.* The holding below cannot be reconciled with this mandate.

The final reason offered for denying recovery, the lack of economic impact, is equally worthy of this Court's consideration. Throughout its opinion, the court below evaluated the economic impact based on the parcel as a whole, rather than by considering the 71 distinct condominium units that were affected. The court used this method of division for both the categorical takings analysis and the partial takings analysis. *See R.W. Docks*, 628 N.W.2d at 784, 790-91. The court held that based on its reading of state and federal caselaw, the economic impact of a regulation must always be considered in light of its effect on the parcel as a whole. *See id.* at 789-90. In so holding, the court declined an offer to follow the reasoning used by the Federal Circuit Court of Appeals in *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994). This issue, addressed by many lower courts, has been phrased the "denominator" problem:

> Because our test for regulatory takings requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction."

Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 497 (1987) (citation omitted).

In *Loveladies Harbor*, the Federal Circuit addressed the denominator problem by adopting "a flexible approach, designed to account for factual nuances." *Loveladies Harbor*, 28 F.3d at 1181.

In this case, where the Wisconsin Supreme Court held it inappropriate to consider any portion of a parcel less than the whole, provides the Court the opportunity to address the denominator problem not raised in *Palazzolo*. *See Palazzolo*, 121 S. Ct. 2448, 2465 (recognizing possible disagreement between this Court's precedent on the issue, but declining to address a problem that had not been presented in the petition for certiorari). The issue has been argued throughout the procedural history of this case, is presented in the petition for certiorari, and is deserving of the Court's resolution.

CONCLUSION

This case presents the Court with an opportunity to correct a confusing and oftentimes contradictory opinion facing numerous circuit courts of appeal and state courts. It provides an opportunity for this Court to further clarify what will constitute a background principle of state property law for the purposes of a *Lucas* analysis while at the same time determining what role the public trust doctrine should play in evaluating both categorical and partial regulatory takings. Additionally, the Court now has a chance to decide the difficult and elusive denominator problem that it was unable to address in *Lucas* and *Palazzolo*. Given the importance of these issues, and the variety of approaches being used in lower courts, it is incumbent upon this Court to resolve the questions presented.

Respectfully submitted,

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